

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on September 15, 2016

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Gregg C. Sayre
Diane X. Burman

CASE 16-E-0401 - Joint Petition of Riverstone Holdings LLC,
Talen Energy Supply, LLC, MACH Gen, LLC, New
MACH Gen, LLC and New Athens Generating
Company, LLC for a Declaratory Ruling or, in
the Alternative Approval of the Acquisition of
Indirect Ownership Interests in New Athens
Generating Company, LLC.

DECLARATORY RULING ON A TRANSFER TRANSACTION

(Issued and Effective September 19, 2016)

BY THE COMMISSION:

INTRODUCTION

In a petition filed on July 15, 2016, Riverstone Holdings LLC (Riverstone), Talen Energy Supply, LLC (Talen Energy Supply), MACH Gen, LLC (MACH Gen), New Mach Gen, LLC (New MACH Gen), and New Athens Generating Company, LLC (New Athens) (collectively, the Petitioners) requested issuance of a declaratory ruling that an indirect transfer of upstream ownership interests in New Athens will not be reviewed further under Public Service Law (PSL) §70 (Petition). The Petition also seeks confirmation that the lightened ratemaking regulatory regime previously approved for New Athens will continue to apply. The jurisdictional facility owned by New Athens is the

approximately 1,138 MW electric generating facility (New Athens Facility) located in Athens, New York.

Responses to the Petition were due within the 21-day period prescribed under the Commission's Rules of Procedure, contained in 16 NYCRR §8.2(c). No comments were received by the deadline, which expired on August 5, 2016. As discussed below, the Commission finds that the relief requested in the Petition is warranted.

THE PETITION

The Petitioners note that New Athens is currently subject to lightened regulation with respect to its ownership and operation of the New Athens Facility, pursuant to the Light Regulation Orders.¹ The Petition does not identify any other entity that holds a direct interest in the New Athens Facility.

Riverstone

Petitioners explain that Riverstone is a private equity firm that controls the general partners of Raven Power Holdings, LLC (Raven), C/R Energy Jade, LLC (Jade), and Sapphire Power Holdings, LLC (Sapphire) (collectively, the Riverstone Funds). The Riverstone Funds, Petitioners continue, hold approximately 35% of the outstanding common stock of Talen

¹ Case 14-E-0022, MACH Gen, LLC, Order Approving Transfers of Ownership Interests and Making Other Findings (issued April 25, 2014); Case 09-E-0144, Strategic Value Partners LLC, Declaratory Ruling on Review of an Ownership Transfer Transaction (issued April 22, 2009); Case 03-E-0516, Athens Generating Company, L.P., Order Approving Transfer and Providing for Lightened Regulation (issued September 17, 2003); and Case 99-E-1629, Athens Generating Company, L.P., Order Providing for Lightened Regulation (issued July 12, 2000) (collectively, the Light Regulation Orders).

Energy Corporation (Talen Energy).² Talen Energy is an upstream owner of Talen Energy Supply, MACH Gen, New MACH Gen, and New Athens.

Talen Energy Supply

According to the Petition, Talen Energy Supply is an indirect and wholly-owned subsidiary of Talen Energy. Petitioners explain that Talen Energy Supply owns public utility subsidiaries that are engaged in the ownership and operation of electric generating facilities in the NYISO, ISO New England, Inc. (ISO-NE), and PJM Interconnection, LLC (PJM) markets. Talen Energy Supply, Petitioners continue, directly or indirectly owns companies that engage in power marketing within each of these markets. Through its relationship with Riverstone, Talen Energy Supply is affiliated with a power marketer that also operates in these markets.³

Petitioners explain that Talen Energy Supply indirectly owns or is affiliated with various natural gas transportation, distribution, and storage facilities, as well as oil pipelines, sites for generation capacity development, and sources of coal supplies. According to Petitioners, each such asset is located outside of New York. Within New York, Petitioners explain that Talen Energy Supply does not own any

² According to the Petition, Raven, Jade, and Sapphire hold ownership interests in Talen Energy of 19.8%, 12.7%, and 2.5%, respectively.

³ Petitioners explain that Talen Energy Supply is also affiliated with Lyonsdale Biomass, LLC, ReEnergy Black River LLC, and ReEnergy Chateaugay LLC, which own or control approximately 92 MW of capacity in the New York Independent System Operator, Inc. (NYISO) control area. Those facilities, Petitioners continue, are qualifying facilities under PSL §2(2-b) and, thus, are exempt from Commission regulation except for Article VII. (Case 15-E-0462, Petition of MACH Gen, LLC et al., Declaratory Ruling on Review of a Merger Transaction [issued October 20, 2015] [Talen Merger Order].)

fuel resources, interstate fuel systems, or other inputs to electricity production.

MACH Gen and New MACH Gen

Petitioners explain that MACH Gen is a wholly-owned subsidiary of Talen Energy Supply and owns 100% of the membership interests in New MACH Gen. New MACH Gen, Petitioners continue, owns 100% of the membership interests in New Athens, as well as interests in companies that own and operate electric generating facilities outside of New York.

New Athens

According to the Petition, New Athens operates the approximately 1,138 MW New Athens Facility that is interconnected with the transmission system owned by Niagara Mohawk Power Corporation d/b/a National Grid. Petitioners explain that New Athens executed an Energy Management and Marketing Agreement with Consolidated Edison Company of New York, Inc. (Con Edison). Pursuant to this Agreement, Con Edison buys power from New Athens that it subsequently sells into the NYISO markets. Petitioners explain that Con Edison also provides New Athens with energy management and marketing services.

The Proposed Transaction

Petitioners report that, on June 2, 2016, an Agreement and Plan of Merger (Merger Agreement) was executed by and between: (a) RPH Parent, LLC (RPH), a wholly-owned subsidiary of Raven; (b) SPH Parent, LLC (SPH), a wholly-owned subsidiary of Sapphire; (c) CRJ Parent LLC (CRJ), a wholly-owned subsidiary of Jade; and (d) RJS Merger Sub Inc. (Merger Sub), which is wholly-owned by RPH, SPH, and CRJ. Petitioners explain that, pursuant to the Merger Agreement, Merger Sub will merge into Talen Energy, with Talen Energy continuing as the surviving corporation. Subject to certain exceptions, each share of Talen

Energy's stock outstanding prior to the merger will be converted into a right to receive \$14 in cash after the merger. The Merger Agreement also provides that the Riverstone Funds will convert their existing ownership interests in Talen Energy's common stock (approximately 35%) into shares of the surviving corporation.

The net result of the proposed transaction will be for all outstanding common stock in Talen Energy, currently held by public shareholders, to be acquired by, and shared among, the Riverstone Funds. Specifically, Raven would increase its ownership interests in Talen Energy from 19.8% to 56.6%, Jade would increase its ownership interests from 12.7% to 36.3%, and Sapphire would increase its ownership interests from 2.5% to 7.1%. The Merger Agreement would result in the indirect transfer of ownership interests in New Athens.

Petitioners maintain that they have satisfied the presumption established in the Wallkill Order.⁴ There, it was decided that PSL §70 regulation would not adhere to a transfer of ownership interests in parent entities upstream from the affiliates owning and operating New York competitive electric generating distribution facilities, unless there were a potential for harm to the interests of captive utility ratepayers sufficient to overcome the presumption. Consequently, Petitioners request that further review of the proposed transaction be disclaimed.

According to Petitioners, the proposed transaction does not raise vertical market power issues. Petitioners argue that all relevant companies currently are affiliated, and the proposed transaction would not create any new affiliation. Moreover, Petitioners continue, neither they nor their

⁴ Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994).

affiliates own any substantial interest in monopoly electric transmission or delivery facilities, or substantial influence over inputs like fuel or fuel transportation into the generation of electricity in New York. Petitioners argue that, for these reasons, there is no risk that any party to the proposed transaction would benefit from market power exercised by any fully-regulated transmission or distribution utility. For similar reasons, Petitioners assert that the proposed transaction would not risk harm to captive utility ratepayers.

Petitioners argue further that the proposed transaction does not raise horizontal market power issues. According to Petitioners, they currently own, control, or are affiliated with approximately 1,230 MW of generating capacity in the NYISO market. Given that the total summer installed generating capacity in that market is approximately 38,576 MW, Petitioners' holdings represent approximately 3.19% of statewide capacity. Petitioners explain that the total generation in New York State held indirectly by their ownership interests would not change as a result of the proposed transaction. Moreover, Petitioners claim that although they own, control, or are affiliated with generation capacity in PJM and ISO-NE, those interests comprise an insufficient amount of the PJM and ISO-NE markets to present any risk of horizontal market power.

DISCUSSION AND CONCLUSION

For the purposes of the proposed transaction, Petitioners have satisfied the Wallkill Presumption. Under this presumption, transactions involving parent entities upstream from the entities owning wholesale electric generation facilities located in New York will be reviewed only if there is the potential for the exercise of market power or other harm to

the interests of captive New York ratepayers. No such potential is apparent here, based on the facts stated in the Petition.

The proposed transaction does not pose the potential for the exercise of horizontal market power in New York. In the Talen Merger Order, the Commission found that the transaction in issue would not pose any potential for the exercise of horizontal market power where Talen Energy Supply and its affiliates would own or control 1,230 MW of generating capacity in NYISO markets, or 3.18% of the total installed capacity.⁵ Here, the amount of generating capacity owned or controlled by Talen Energy and its affiliates would remain static at 1,230 MW after the proposed transaction is consummated. The Petition does not describe any changed circumstance that warrant a finding of potential horizontal market power that did not exist previously.

In addition, the proposed transaction will not cause generation ownership concentration within markets adjacent to the NYISO to rise to levels where horizontal market power could be exercised within NYISO markets. The Commission previously found that Talen Energy Supply's ownership or control of, or affiliation with, approximately 15,405 MW and 554 MW of generation capacity in PJM (8.67%) and ISO-NE (1.8%), respectively, would be insufficient to pose a risk of horizontal market power within the NYISO market.⁶ This finding was supported by the fact that transmission constraints limit the potential transfer of power from ISO-NE and PJM into the NYISO market. Here, consummation of the proposed transaction would not increase Talen Energy's ownership or control of, or

⁵ Talen Merger Order at 7.

⁶ Id. at 6-7.

affiliation with, generation capacity in either PJM or ISO-NE. The Petition does not describe any changed circumstance that might warrant a contrary finding that Petitioners' interests in generation located in adjacent markets pose a risk of horizontal market power.

The proposed transaction does not pose the potential for the exercise of vertical market power. Neither Talen Energy nor its affiliates exercise control over electric delivery facilities other than interconnections, or have a substantial influence over inputs, like fuel, into the production of generation supply within New York. To the extent that Petitioners may hold interests in such facilities located outside of New York, those interests cannot create vertical market power inside New York.

After the transaction is consummated, lightened regulation of New Athens will continue as described in the Light Regulation Orders. Petitioners are reminded that, under light regulation, they and the entities controlling operations of the New Athens Facility remain subject to the PSL with respect to matters such as enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed in prior orders regarding lightened regulation.⁷ Included among those requirements are the obligations to give notice of generation retirements,⁸ to report personal injury accidents pursuant to 16

⁷ Pursuant to the Order Adopting Annual Reporting Requirements Under Lightened Ratemaking Regulation issued January 23, 2013 in Case 11-M-0294, the owners of lightly-regulated generation facilities are required to file Annual Reports.

⁸ Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

NYCRR Part 125 and, where applicable, to conduct tests for stray voltage on all publicly accessible electric facilities.⁹

The Commission finds and declares:

1. No further review will be conducted of the proposed transaction described in the Petition and discussed in the body of this ruling.

2. This proceeding is closed.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary

⁹ See Case 04-M-0159, Safety of Electric Transmission and Distribution Systems, Order Instituting Safety Standards (issued January 5, 2005).